

FTB NOTICE

California Franchise Tax Board - Legal Division



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FTB NOTICE 92-12

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December 28, 1992

Control Number:
410:BRL:CN-92-871

SUBJECT: CLARIFICATION OF FTB NOTICE 92-9; SUBSTANTIAL UNDERSTATEMENT PENALTY GUIDELINES

FTB Notice 92-9, September 18, 1992, set forth California Substantial Underpayment Penalty Guidelines (including special procedures for Coordinated Examination Program (CEP) taxpayers) for taxpayers to comply with California disclosure requirements for items required to be disclosed under Internal Revenue Code §6662(d) and Revenue and Taxation Code §§25935 and 18685. This Notice conforms the effective date to that of the underlying statute and explains in greater detail how a "qualified amended return" should be prepared and filed.

1. Effective Date

The procedures set forth in this Notice and Notice 92-9 generally apply to returns for income (taxable) years beginning on or after January 1, 1990 and for the examination of any other corporate income year for which an assessment is or was made on or after July 16, 1991 (see Revenue and Taxation Code §25935 (a)(2)(B).)

2. Statement furnished to examining agent by CEP Taxpayers in lieu of Amended Return

Some copies of Notice 92-9 erroneously directed taxpayers to include the caption "Furnished under FTB Notice 92-8." The caption should properly read "92-9." However, an incorrect caption will not disqualify the statement as long as it is furnished to the examining agent within the proper time period and contains the proper information and declaration.

3. Qualified Amended Returns - Automatic Waiver

The federal requirements for filing a qualified amended return may be found in Treas. Reg. §§ 1.6661-2(d)(2), 1.6661-6(c)(2)(automatic waiver) and 1.6661-4(b) (disclosure on attached statement). In summary, an automatic waiver of the substantial understatement penalty will be granted if the taxpayer makes adequate disclosure or shows an additional amount of tax on a "qualified amended return." A "qualified amended return" must be a proper amended return or partnership administrative adjustment

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request filed after the due date of the return and before the taxpayer is first contacted concerning an examination (except CEP Taxpayers - See Notice 92-9) [Treas. Reg. §1.6661-6(c)(2).] The disclosure must be in a statement setting forth particular facts as outlined in 1.6661-4(b). As California does not have regulations specifying what constitutes a "qualified amended return" or what must be in a statement to constitute adequate disclosure, these federal regulations apply for California purposes, with due account for differences in federal and state terminology. (See §§23051.5(f), 17024.5.)

Specifically, these federal provisions apply for California as follows:

- a. A "qualified amended return" must be filed on the California Amended Return form: i.e. Form 100X for Corporations and Form 540X for individuals. (cf. §1.6661-6(c)(2).) To ensure proper handling, write "SUBSTANTIAL UNDERSTATEMENT DISCLOSURE" on the top of the first page of the amended return.
- b. The statement attached to the return should include a caption identifying the statement as a substantial understatement penalty disclosure statement (cf. §1.6661-4(b)(1)(i).)
- c. If a CEP taxpayer is making a disclosure by written statement other than an amended return after the examination has begun, the requirements of FTB Notice 92-9 must be followed.
- d. For other than CEP taxpayers, disclosure must be made before the taxpayer is first contacted by the Franchise Tax Board concerning an examination of the return (cf. §1.6662-6(c)(2)(i).) If disclosure is not made by that time, an automatic waiver is not available, and the taxpayer must show reasonable cause and good faith to avoid the penalty (cf. §1.6661-6(b).)

DRAFTING INFORMATION

The principal author of this notice is Bruce R. Langston of the Franchise Tax Board Legal Division. For further information regarding this notice, contact Mr. Langston at the Franchise Tax Board Legal Division, P.O. Box 1468, Sacramento, CA 95812-1468.